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INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE

Written statement submitted by the American Association of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1996/31

[16 December 1999]

GE.00-10767 (E)

OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, ADOPTED BY THE GENERAL ASSEMBLY ON 6 OCTOBER 1999 (resolution 54/4)

1. At its 1999 session the General Assembly adopted the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The importance of a mechanism for the submission of complaints concerning violations of the provisions of the Convention was emphasized by the 1993 World Conference on Human Rights in the Vienna Declaration and Programme of Action and confirmed by the World Conference on Women held in Beijing in 1995 in its Platform for Action.

2. The American Association of Jurists (AAJ) welcomes this new mechanism, which will enable women to assert their rights at the international level, and hopes that speedy ratification by member States will enable it to come into force immediately.

3. At the same time, the AAJ wishes to make the following comments.

Entities responsible for violations of the provisions of the Convention

4. The Optional Protocol appears to consider as falling within its scope only violations of human rights committed by States. It thus excludes private individuals or institutions, States other than that exercising jurisdiction, international organizations and private international institutions or enterprises. However, article 2 (e) of the Convention provides that States parties undertake to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise", while the Committee which supervises the implementation of the Convention (the Committee on the Elimination of Discrimination against Women) has stated that "discrimination under the Convention is not restricted to action by or on behalf of Governments", quoting articles 2 (e), 2 (f) and 5 in support of its assertion. It has also stated that, under international law, States might also be responsible for private acts if they failed to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation (general recommendation No. 19 of the Committee on the Elimination of Discrimination against Women (1992), para. 9).

5. The restrictive scope of the Protocol with regard to violations of the principles of the Convention fails to take into account the new tendencies in legal doctrine and case law on the subject. Since Nuremberg, and more recently with the establishment of tribunals for the prosecution of crimes against human rights committed in the territories of the former Yugoslavia or in Rwanda, and with the approval of a Statute for an International Criminal Court, the principle of trial of individuals by international courts for violations of human rights connected with crimes and offences deemed to be such in international law (possible examples being the systematic rape of women during a war, trafficking in women for purposes of prostitution and pornography and the international trafficking of individuals for forced labour) is fully accepted.

The Protocol states that the complainant must be under the jurisdiction of the State against which the complaint is made

6. The AAJ considers that this clause is anachronic for the reasons given below.

7. Present-day international law confers on individuals the status of subjects of international law. This being the case, the general principle is that individuals must, in accordance with the conditions laid down by law, be able to intervene before the competent bodies when their rights are infringed, not only by the State under whose jurisdiction they are, but by any State and any legal or physical person. This is reflected in the regional instruments on the protection of human rights, none of which contain the requirement that a complainant must be under the jurisdiction of the State against which the complaint is made.

8. The text of article 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights has given rise to numerous problems within the Human Rights Committee, precisely because that text restricts the right of complaint concerning violations committed by a State to "individuals subject to its jurisdiction".

9. In the exercise of its quasi-jurisdictional function, the Human Rights Committee has encountered the problem that, if it applied article 2 of the Covenant and article 1 of the first Optional Protocol to the letter, it would be depriving of protection individuals resorting to it to complain of serious violations of their civil and political rights committed by other States to the jurisdiction of which they are not subject.

The Human Rights Committee has very aptly said that "It would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." [1]

10. In 1993 the Human Rights Committee returned to the question in connection with the events in the former Yugoslavia. During the consideration of the report of the Federal Republic of Yugoslavia (Serbia and Montenegro) one member of the Committee stated that "States were responsible for ensuring respect for human rights when their representatives were implicated and when their acts affected human beings, even outside their national territory."[2]

11. In 1995, in its comments on the report of the United States of America, the Human Rights Committee stated: "The Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that State's territory".[3]

12. The obligation to respect civil and political rights is a universal passive obligation, and any violation thereof justifies the intervention of the international community through its competent bodies. For instance, the systematic violation of article 11 of the Convention on the Elimination of All Forms of Discrimination against Women by a transnational enterprise which infringes the regulations of a State in which it has a subsidiary is certainly creating liability on the part of the State in which the infringement is committed, but it may also, in some cases, create liability on the part of the State in which the headquarters of the enterprise is located.[4]

13. The requirement that the complainant must be subject to the jurisdiction of the State against which the complaint is made will be a major obstacle which will hamper the submission

of complaints by victims of international trafficking in women for purposes of sexual exploitation (women who are taken from one country to another to be sexually exploited and are subsequently deported from the latter country will be unable to file complaints against the latter State because they will not be subject to its jurisdiction). How, then, can the victims be deprived of the right to address themselves to the competent bodies because they are not "subjects" of the State committing the violation?

14. To overcome this shortcoming in the Protocol the Committee on the Elimination of Discrimination against Women will have to engage in a process of interpretation, as the Human Rights Committee has done.

15. The approval of the Optional Protocol is an important step forward; but other steps will have to be taken to adapt the Convention on the Elimination of All Forms of Discrimination against Women to the needs of the present-day world.

16. The Convention contains no standards relating to the protection of the physical integrity, the freedom and the security of women engaged in prostitution or to the economic and social rights of women who are heads of lone-parent families; or to the protection of women migrant workers. Nor have the principles laid down in the Declaration on the Elimination of Violence against Women been incorporated in it.

17. As regards work, the Convention accepts the traditional definition of work as "employment in the structured sector". It thus excludes millions of women who are struggling to subsist in the informal sector of the economy. The enormous contribution which women make to the economy through their unpaid labour, in both the field of biological and social reproduction and in that of production, within the community and within society, only deserves a mention in article 14, paragraph 1, which is in any case restricted to rural areas.

Finally, the AAJ wishes to recall the absence from the Convention of any reference to the right of women to rest, to a reasonable working day and to the enjoyment of leisure time.

Notes

[1] Human Rights Committee, selected decisions under the Optional Protocol (CCPR/C/OP/1), New York, United Nations, 1988, communications 52/1979 and 56/1979.

[2] Official Records of the Human Rights Committee 1992/93, United Nations, New York and Geneva, 1996, vol. I, p. 152, para. 23.

[3] Human Rights Committee, fifty-third session, CCPR/C/79/Add.50, 7 April 1995.

[4] Rigaux, François, "Les sociétés transnationales" in Bedjaoui, Mohammed, Droit international-Bilan et perspectives, Title I: "Le sujets du droit international".